

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment on the dates alleged?
- (2) Did claimant provide timely notice of accident pursuant to K.S.A. 44-520?
- (3) If claimant failed to provide timely notice of accident under K.S.A. 44-520, was there just cause for claimant's failure to so notify respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be affirmed. Claimant, a lead custodian for respondent, alleges an injury sometime in July 2002. He testified that the injury would have occurred after the Fourth of July break, approximately on or after July 8, 2002.

Claimant did not initially report the accident, as he had been having abdominal problems and pain for approximately a month, for which he was receiving medical care. Claimant stated that the pain across his abdomen was severe enough that it masked any pain in his back. Claimant testified that he began receiving medical treatment in June, but the first documented record of any medical care is with Fred A. Rice, Jr., M.D., on July 16, 2002. At that time, claimant had left sided low back pain, which he stated had been in existence for about two weeks. Claimant could not remember any unusual strain, injury or provocation leading to the back pain. Claimant testified he was given an off-duty slip by Dr. Rice. The first off-duty slip contained in the record is dated August 2, 2002. Claimant's uncontradicted testimony is that he took this off-duty slip to respondent's office and advised them that he had suffered a work-related back injury.

It is acknowledged in the record claimant did not begin receiving authorized medical care for this back injury until September 16, 2002. However, claimant was adamant that he provided notice to respondent of the work-related injury prior to the September 16, 2002 examination with the newly authorized workers' compensation doctor.

Claimant testified that he had been lifting tables and was working by himself when he began having back problems and that the back problems did not actually begin until sometime that night. The Board acknowledges claimant's testimony is somewhat confused, especially regarding dates. However, the Board finds claimant's testimony sufficiently reliable to support his contention that he suffered an injury arising out of and in the course of his employment with respondent on or around July 8, 2002, while moving desks and tables.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹ Here, claimant is the only person to testify. His testimony, while somewhat confused, is for the most part uncontradicted. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy.²

¹ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

² *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

The Board finds that whether claimant was injured while working for respondent hinges somewhat on claimant's credibility. The Administrative Law Judge, having the opportunity to view claimant's testimony in person, awarded benefits, thereby indicating that claimant was credible, although not the best historian. The Board generally finds some deference should be given to the Administrative Law Judge's conclusions, since she had the opportunity to assess claimant's testimony in person. The Board, therefore, affirms the Administrative Law Judge's determination that claimant suffered accidental injury arising out of and in the course of his employment.

K.S.A. 44-520 requires that notice of an accidental injury be given to the employer within ten days of the accident. The Administrative Law Judge found, and the Board affirms the finding, that claimant suffered accidental injury on or about July 8, 2002. There is no indication that claimant provided notice within ten days of that particular date. The best claimant can estimate is that he provided notice to respondent sometime in August of 2002. Clearly that violates the ten-day period set forth in K.S.A. 44-520.

However, K.S.A. 44-520 goes on to state that in the event an employee fails to provide notice within ten days, the notice time can be extended to 75 days if just cause exists for the claimant's failure to provide notice within ten days.

In this instance, claimant was suffering from two maladies. The first, a bowel obstruction, was causing him significant abdominal pain. Claimant testified he was off work through most of July and all of August due to the pain associated with this bowel obstruction or constipation. That would indicate claimant's pain would very possibly mask the existence of claimant's back problems. The fact that claimant might delay in noticing that he suffered a back injury would be understandable. Additionally, the medical records of Dr. Rice did not uncover the existence of a small herniated disc at the L4-L5 level until the MRI was performed. Claimant was not advised of this problem until sometime after July 31, 2002. The Board, therefore, finds that there was just cause for claimant's failure to provide notice to respondent within ten days of the July 8, 2002 accident. Therefore, pursuant to K.S.A. 44-520, the notice provided by claimant within 75 days of the accident would be timely.

The Board, therefore, finds that the Order of the Administrative Law Judge dated December 17, 2002, should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Julie A. N. Sample dated December 17, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2003.

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent
Julie A. N. Sample, Administrative Law Judge
Director, Division of Workers Compensation